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**March 1, 1999**

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Ms. Magalie R. Salas  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W., TWA325  
Washington, D.C. 20554

**Via Facsimile**

**Re: MM Docket Nos. 98-204 and 96-16**

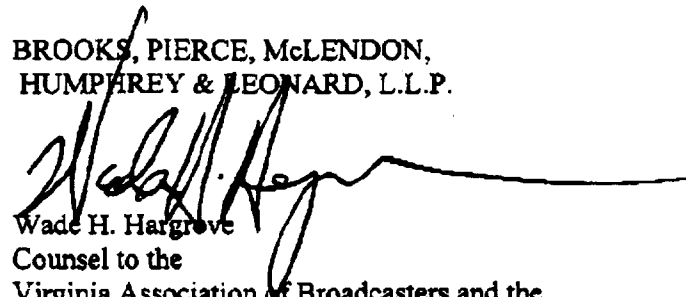
Dear Ms. Salas:

Transmitted herewith, on behalf of the Virginia Association of Broadcasters and North Carolina Association of Broadcasters, are an original and six (6) copies of *Joint Comments of the Virginia Association of Broadcasters and North Carolina Association of Broadcasters*, with respect to the above proceedings.

If any questions should arise during the course of your consideration of this matter, it is respectfully requested that you communicate with this office.

Very truly yours,

**BROOKS, PIERCE, McLENDON,  
HUMPHREY & LEONARD, L.L.P.**

  
Wade H. Hargrove  
Counsel to the  
Virginia Association of Broadcasters and the  
North Carolina Association of Broadcasters

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MAR - 1 1999

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of )

Review of the Commission's )  
Broadcast and Cable )  
Equal Employment Opportunity )  
Rules and Policies )  
and )  
Termination of the )  
EEO Streamlining Proceeding )

MM Docket No. 98-204

MM Docket No. 96-16

To: The Commission

JOINT COMMENTS OF  
VIRGINIA ASSOCIATION OF BROADCASTERS AND  
NORTH CAROLINA ASSOCIATION OF BROADCASTERS

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March 1, 1999

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## Summary

While the Associations and their constituent members are committed to equal opportunity principles and to the historic purpose of the EEO rule, which is to offer equal employment opportunities to all qualified persons, the FCC's proposed EEO rule has serious practical and constitutional deficiencies. Any new EEO rule adopted by the FCC must not raise constitutional concerns, and must not be burdened with procedural requirements which elevate form over substance and which ignore practical, real-world efforts to create employment opportunities--without regard to race or sex--in the broadcast industry.

To satisfy constitutional concerns, any new EEO rule must be neutral with respect to race and gender. The United States Supreme Court's decision in *Adarand Constructors, Inc. v. Peña*<sup>1</sup> and the D.C. Circuit's decision in *Lutheran Church-Missouri Synod v. FCC*<sup>2</sup> cast serious doubt on the constitutionality of any FCC EEO program that is not absolutely neutral with respect to race and ethnicity. Under these cases, any FCC EEO program that encourages race-based decisions at *any point* in the employment decision-making process would likely be subject to strict scrutiny review, and it is unlikely that such a program could withstand a constitutional challenge. Also, it is unlikely that a program that encourages gender-based decisions could withstand a constitutional challenge under intermediate review.

Moreover, it is the experience of the Associations' members that overly burdensome administrative and recordkeeping requirements can lead to dislocations in recruiting efforts which may be detrimental to the overall goal of encouraging wide participation in the broadcast industry.

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<sup>1</sup>515 U.S. 200 (1995)

<sup>2</sup>141 F.3d 344 (D.C. Cir. 1998), *reh'g denied*, 154 F.3d 487 (Sept. 15, 1998), *suggestion for reh'g en banc denied*, 154 F.3d 494 (Sept. 15, 1998).

In particular, administrative and recordkeeping burdens on smaller broadcasters can be especially onerous and are disproportionate to the benefits derived from these requirements. To address these concerns, the Associations propose that any new EEO administrative requirements should be reasonable, and that any new EEO rule should allow significantly expanded safe harbors for broadcasters with respect to administrative and recordkeeping requirements.

Specifically, any new EEO recruitment requirements should not be rigid, rather they should give broadcasters flexibility in adopting outreach approaches. Any new rule should simply focus on whether a broadcaster is acting in a fair and nondiscriminatory manner. Moreover, any self-assessment reporting and recordkeeping burdens should be reasonable. At most, a self-assessment analysis should be race and gender neutral and consist of answering a series of questions requiring a "yes" or "no" response. Also, with respect to recordkeeping, broadcasters should have discretion in deciding what types of records to retain. Finally, broadcasters should qualify for an exemption from the EEO reporting and recordkeeping requirements if (1) they employ twenty-five (25) or fewer full-time employees, or (2) they participate in qualified job fairs, on-campus recruiting activities, approved EEO programs, or qualified internship or training programs.

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Review of the Commission's	)	MM Docket No. 98-204
Broadcast and Cable	)	
Equal Employment Opportunity	)	
Rules and Policies	)	
and	)	
Termination of the	)	MM Docket No. 96-16
EEO Streamlining Proceeding	)	
To: The Commission		

**JOINT COMMENTS OF  
VIRGINIA ASSOCIATION OF BROADCASTERS AND  
NORTH CAROLINA ASSOCIATION OF BROADCASTERS**

The Virginia Association of Broadcasters ("VAB") and North Carolina Association of Broadcasters ("NCAB") (collectively, the "Associations"), by and through their undersigned counsel and pursuant to Section 1.415 of the Commission's rules, 47 C.F.R. § 1.415, respectfully submit the following comments in response to the Commission's *Notice of Proposed Rule Making* (the "*Notice*"), FCC 98-305 (released Nov. 20, 1998)<sup>3</sup> in the above-referenced docket.

**Introduction**

VAB is a voluntary trade association consisting of some 22 television and 104 radio stations in Virginia. NCAB is a voluntary trade association of some 23 television and 154 radio stations in North Carolina. These comments are filed in response to the Commission's *Notice* released on November 20, 1998 seeking comment on a proposed new broadcast equal employment opportunity

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<sup>3</sup>These Comments are timely filed pursuant to the Commission's *Order*, released February 12, 1999, establishing March 1, 1999 as the new filing deadline for comments.

("EEO") rule. Parts of the Commission's old EEO rule were held unconstitutional by the Court of Appeals for the D.C. Circuit in *Lutheran Church - Missouri Synod v. FCC*,<sup>4</sup> and the Commission's proposed new rule must be consistent with that decision. It appears, however, that with its proposed rule, the Commission is proposing to reinstate many of the same requirements which were found constitutionally suspect by the *Lutheran Church* court. The Associations respectfully submit these comments in order to suggest specific revisions to the proposed new EEO rule that are appropriate in light of the experiences of Virginia and North Carolina broadcasters with the old EEO rule and the requirements of the *Lutheran Church* decision.<sup>5</sup>

<sup>4</sup>141 F.3d 344 (D.C. Cir. 1998), *reh'g denied*, 154 F.3d 487 (Sept. 15, 1998), *suggestion for reh'g en banc denied*, 154 F.3d 494 (Sept. 15, 1998) ("Lutheran Church").

at annual conventions and other meetings.

Nonetheless, the Associations believe that any new EEO rule must not be constitutionally suspect, and must not become bogged down by procedural requirements which elevate form over substance and which ignore practical, real-world efforts to better the lives of individuals through training and internships. It is the experience of the Associations' members that overly burdensome administrative and recordkeeping requirements can lead to dislocations in recruiting efforts which may be detrimental to the overall goal of encouraging wide participation in the broadcast industry. In particular, administrative and recordkeeping burdens on smaller broadcasters can be especially onerous and are disproportionate to the benefits derived from these requirements.

**I. To Satisfy Constitutional Concerns, Any New EEO Rule Adopted by the Commission Must Be Neutral With Respect to Race, Ethnicity, and Gender**

A federal program that favors one race, ethnicity, or gender over any others would transgress equal protection with respect to all, and thus would be constitutionally suspect under the Fifth Amendment's Due Process Clause.

The United States Supreme Court's decision in *Adarand Constructors, Inc. v. Peña*<sup>6</sup> and the D.C. Circuit's decision in *Lutheran Church* cast serious doubt on the constitutionality of any FCC EEO program that is not absolutely neutral with respect to race and ethnicity. In *Adarand*, the Supreme Court held that strict scrutiny is the appropriate standard of review for federal affirmative action programs which use racial or ethnic classifications as the basis for decision-making.<sup>7</sup> As the D.C. Circuit in *Lutheran Church* recognized, it is likely that this high standard of constitutional

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<sup>6</sup>515 U.S. 200 (1995)

<sup>7</sup>*Adarand*, 515 U.S. at 227.

review applies to all employment decisions, whether "preliminary" or "ultimate."<sup>8</sup> The D.C. Circuit noted that the Commission's old EEO rule affected both preliminary and ultimate employment decisions.<sup>9</sup> That is, broadcasters had to consider race when deciding how to fill job vacancies, and stations were also effectively pressured, by the operation of the FCC's processing guidelines, into granting preference to minorities in actual hiring. Because the Commission's old EEO rule encouraged racial preferences with respect to ultimate hiring decisions, the court found the Commission's old EEO rule to be unconstitutional without having to address whether the strict scrutiny analysis applies to preliminary employment decisions.<sup>10</sup> Nonetheless, the D.C. Circuit did not condone preliminary race-based decisions, and recognized that constitutional equal protection jurisprudence would not seem to draw a distinction between preliminary and ultimate employment decisions.<sup>11</sup> Accordingly, any FCC EEO program that encourages race-based decisions at *any point* in the employment decision-making process would likely be subject to strict scrutiny. For example, any requirement that a broadcaster use a specific number of minority recruitment sources would likely be subject to strict scrutiny and therefore, as shown below, would be constitutionally suspect.

Applying the strict scrutiny required by *Adarand*, governmental classification systems based on race must advance a "compelling" governmental interest and must be "narrowly tailored" to achieve that purpose. As the *Lutheran Church* decision points out, it is highly unlikely that there is any compelling governmental interest for racial classifications in an FCC EEO program. Given

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<sup>8</sup>*Lutheran Church*, 141 F.3d at 351.

<sup>9</sup>*See id.*

<sup>10</sup>*See id.* at 351-52.

<sup>11</sup>*See id.* at 352.

the Supreme Court's trend in affirmative action cases towards striking down all racial preferences, the Commission's interest in "diverse programming" is not likely at the "compelling" level.<sup>12</sup> Even assuming that the Commission's interest in "diverse programming" is a compelling interest, race-based EEO regulations are not narrowly tailored to further that interest. The notion that a diverse group of employees leads to diverse programming is tenuous and speculative at best. There is no record evidence before the Commission demonstrating a causative link between a station's ethnic make-up and its programming. Indeed such a concept is a product of racially stereotypical thinking which should not be promoted by this Commission.

Under similar reasoning, it is unlikely that gender classifications could withstand constitutional scrutiny--any FCC gender classification would not be "substantially related" to any legitimate interest of the Commission.

Because any FCC EEO program that encourages race-based decisions at any point in a broadcaster's hiring process would be subject to strict scrutiny, any such program would be constitutionally suspect. Moreover, it is unlikely that there is any connection between a gender-based classification and any interest of the Commission that would satisfy constitutional scrutiny. Therefore, to avoid further constitutional challenges, the FCC's new EEO rules must be absolutely neutral with respect to race, ethnicity, and gender.

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<sup>12</sup>See *id.* at 354.

## II. The Proposed EEO Rule Seeks to Impose Administrative Requirements Which Are Excessive in Light of the Demonstrated Advancements in the Employment of Minorities and Women in the Broadcast Industry

According to statistics compiled by the FCC and parties who filed comments in the now terminated EEO streamlining proceeding,<sup>13</sup> the employment of minorities and women in full-time broadcast capacities has grown dramatically. In 1997, minorities accounted for 18.2% of broadcast professionals (Officials and Managers, Professionals, Technicians, and Sales Workers),<sup>14</sup> up from 8.0% in 1971 and 13.4% in 1980.<sup>15</sup> Moreover, in 1997, minorities accounted for 20.2% of all full-time broadcast employees.<sup>16</sup> As a percentage of the overall United States workforce, the representation of minorities rose from 24.3%<sup>17</sup> in 1994 to 26% in 1997,<sup>18</sup> an increase of 1.7%. During the same period the representation of minorities in full-time broadcast positions increased 1.8%, from 18.4% to 20.2%.<sup>19</sup> Thus, the representation of minorities in the broadcast industry has increased at a rate similar to that of the entire American workforce, professional and nonprofessional

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<sup>13</sup>See Streamlining Broadcast EEO Rule and Policies, *Order and Notice of Proposed Rule Making*, 11 FCC Rcd 5154, MM Docket No. 96-16 (1996) (terminated in Review of the Commission's broadcast and Cable Equal Employment Opportunity Rules and policies, *Notice of Proposed Rule Making*, FCC 98-305 (released Nov. 20, 1998), ¶ 94).

<sup>14</sup>*Public Notice, 1997 Broadcast and Cable Employment Report*, released June 23, 1998 [hereinafter *1997 Employment Report*].

<sup>15</sup>See Streamlining Broadcast EEO Rule and Policies, *Comments of EEO Supporters*, MM Docket No. 96-16 (1996) [hereinafter *Supporter Comments*], at 36.

<sup>16</sup>See Equal Employment Opportunity Trend Report, Prepared for FCC Industry EEO Unit on June 5, 1998.

<sup>17</sup>See Streamlining Broadcast EEO Rule and Policies, *Comments of The National Association of Broadcasters*, MM Docket No. 96-16 (1996) [hereinafter *NAB Comments*], at 8.

<sup>18</sup>See *1997 Employment Report*.

<sup>19</sup>See Equal Employment Opportunity Trend Report, Prepared for FCC Industry EEO Unit on June 5, 1998.

alike.

Likewise the percentage of broadcast professionals who are women dramatically increased from 10.2% in 1971<sup>20</sup> to 34.9% in 1997.<sup>21</sup> In fact, the percentage of women in full-time broadcast positions has increased significantly compared to the overall national workforce. Between 1994 and 1997, the percentage of women in the national labor force only increased by a modest 0.3% (from 45.9%<sup>22</sup> to 46.2%<sup>23</sup>), while the percentage of women in full-time broadcast positions increased by 1.1% (from 39.9%<sup>24</sup> to 41%<sup>25</sup>). Such significant increases in the employment of women and minorities belies any notion that institutional discrimination is practiced in the broadcast industry.

Given the broadcast industry's demonstrated commitment to equal employment, unlike the Commission's suspended EEO rule, any new EEO rule adopted by the Commission should not elevate form over substance. The Commission's old EEO rule created a harmful distortion in the hiring process of broadcasters by imposing enormous administrative and recordkeeping burdens which bore no relation to a broadcaster's individual EEO program. Under the old rule, the FCC repeatedly levied substantial forfeitures on broadcasters for failure to generate and maintain sufficient EEO records. Rather than imposing administrative burdens, any new EEO rule adopted by the Commission should focus on whether a broadcaster is acting in a fair and nondiscriminatory

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<sup>20</sup>See *Supporter Comments*, at 36.

<sup>21</sup>See *1997 Employment Report*.

<sup>22</sup>*NAB Comments*, at 8.

<sup>23</sup>See *1997 Employment Report*.

<sup>24</sup>See *Equal Employment Opportunity Trend Report*, Prepared for FCC Industry EEO Unit on June 5, 1998.

<sup>25</sup>See *id.*

manner and has taken reasonable steps to provide employment opportunities to all qualified persons.

Under the Commission's old EEO rule, broadcasters had to spend an enormous amount of time, effort, and resources in complying with the rule's administrative and recordkeeping requirements. As the EEO rule was enforced, broadcasters had to maintain, at a minimum, the following information:

- (1) a list of all referral sources utilized for each opening;
- (2) the numbers of referrals (broken down by race and sex) received from each referral source;
- (3) the number of applicants (broken down by referral source, sex and race) for each job opening;
- (4) the number of interviewees (broken down by referral source, sex and race) for each job opening; and
- (5) the name, race and sex of each new hire or promotion.

This information had to be kept for a broadcaster's entire license term. In the event that a license challenge was mounted, broadcasters had to be able to explain why a particular hiring and interview decision was made some five to eight years ago! Thus, broadcasters had to make and keep notes reflecting all contacts with job applicants and interviewees over the license term. In short, broadcasters were well-advised to maintain each and every piece of paper generated for the entire license term in connection with a station's hiring and firing decisions.

Indeed, broadcasters' comments in the streamlining proceeding confirm that complying with the old EEO rule was a procedural nightmare, requiring documentation of every stage of the hiring process. The Named State Broadcasters Associations' Comments outlined 21 discrete steps in this

process--all requiring extensive staff time and documentation.<sup>26</sup> Moreover, according to the Texas Association of Broadcasters, compliance with the EEO rule cost their state's broadcasting industry \$12.3 million in 1994.<sup>27</sup> This is money that could have been better used to further the goals of equal employment, such as being used to purchase or produce programming of a diverse character, to recruit women and minorities, or to add staff, thereby furthering each station's service to its respective community. Also, in a survey of forty-one broadcasters representing a cross section of radio and television markets and staff sizes, the Montana Broadcaster's Association reported that an average of 165 hours per year were spent on EEO duties.<sup>28</sup> Of the various EEO duties, broadcasters reported that recordkeeping was most onerous.<sup>29</sup>

In the face of this evidence, the Commission's proposed new EEO rule would re-instate these same overly-burdensome procedural requirements. This proposal is disappointing given the Commission's expressed interest in streamlining its old EEO rule and the extensive record compiled by the Commission in its now defunct EEO streamlining proceeding. By virtue of the record compiled in the streamlining proceeding, the Commission is well-acquainted with the inefficiencies and excessive administrative burdens created by the old rule, and it would constitute an abuse of the Commission's discretion to merely re-instate these same requirements, particularly in light of the record concerning the employment of minorities and women in the broadcast industry and the D.C.

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<sup>26</sup>See Streamlining Broadcast EEO Rule and Policies, *Comments of The Named State Broadcasters*, MM Docket No. 96-16 (1996), at 5-6.

<sup>27</sup>See Streamlining Broadcast EEO Rule and Policies, *Comments of Texas Association of Broadcasters*, MM Docket No. 96-16 (1996), at 16.

<sup>28</sup>See Streamlining Broadcast EEO Rule and Policies, *Comments Montana Broadcaster's Association*, MM Docket No. 96-16 (1996), at 28-29.

<sup>29</sup>*Id.*

Circuit's decision in *Lutheran Church* calling into question race-specific affirmative action requirements.

### **III. Any New EEO Rule's Administrative Requirements Should Be Reasonable**

#### **A. Specific Recruitment Requirements Should Not Be Rigid, Rather They Should Give Broadcasters Flexibility in Adopting Outreach Approaches**

The revised rule as proposed in the *NPRM* does not list a specific recruitment requirement other than to state that broadcasters are required to recruit for every vacancy, except for those jobs that are filled by internal promotions.<sup>30</sup> However, the Commission plans to set forth a specific recruitment requirement in the finalized rule and is seeking comment on various approaches.<sup>31</sup>

The Associations recommend an approach that would afford broadcasters greater flexibility to fashion their EEO programs. Under this proposal, broadcasters should be given wide discretion to determine how to conduct non-discriminatory outreach efforts. Broadcasters could use a wide variety of recruitment efforts which would include using various recruitment sources, establishing internship programs with local high schools, colleges and universities, participating in minority and women focused job fairs, and participating in approved EEO programs. With this flexibility, broadcasters could fashion their EEO efforts in ways best suited to their local communities, rather than being forced to having to follow a "cookie cutter," FCC-mandated program.

The harsh irony of the procedural requirements of the Commission's old EEO rule was that the amount of resources that had to be expended on unproductive procedural matters rose in direct proportion to the vitality of a station's EEO program. These inefficiencies should not be continued

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<sup>30</sup>See Notice, ¶ 63.

<sup>31</sup>See *id.* ¶ 63.

in any "next generation" EEO rule adopted by the Commission. Any new EEO rule should give broadcasters flexibility in creating outreach programs and should have only reasonable administrative requirements. The new rule should simply focus on whether a broadcaster is acting in a fair and nondiscriminatory manner.

Approaches that would require broadcasters to use specific recruitment efforts or to use a specific number of recruitment sources would needlessly constrict broadcasters. For instance, consider a station in a small community that has established a successful internship program with a local college that reaches a broad cross section of students. If a position opens up that a past intern is qualified for, why should the station have to notify a specific number of recruitment sources of the open position before offering the job to the past intern? Surely such a requirement would simply waste the time and resources of the station--the station is familiar with the qualifications of the candidate, and the station has already demonstrated its commitment to broad outreach in employment through its internship program.

Indeed, the adoption of rigid, specific recruitment requirements will make the recruiting and hiring process considerably longer than necessary. For example, a broadcaster may have the perfect candidate available for hire at the time a job is vacated. However, if there are rigid recruitment requirements, the broadcaster could not hire that person immediately because it would have to jump through all the EEO rule's procedural hoops to prove it was recruiting in a nondiscriminatory fashion. By the time an applicant pool is established and interviews were conducted, that perfect candidate may well have taken a job elsewhere.

Thus, a regulatory approach that would require stations to use specific recruitment efforts would dramatically limit broadcasters in tailoring their EEO efforts to their local communities and individual circumstances. The FCC should evaluate broadcasters' EEO efforts on the basis of

whether a broadcaster is acting in a fair and nondiscriminatory manner, not on the basis of whether they fit within a regulatory mold. Thus, the new EEO rule's specific recruiting requirement should provide broadcasters wide flexibility in adopting employment outreach approaches.

**B. Self-Assessment Reporting and Recordkeeping Burdens Should Be Reasonable**

Any self-assessment and recordkeeping requirements adopted by the Commission in its EEO rule must be reasonable to ensure that stations can focus their EEO resources on productive efforts rather than administrative matters.

At most, a self-assessment analysis should consist of answering a series of questions requiring a "yes" or "no" response. Such questions could include the following: Does the station use a variety of sources when filling some or all open positions? Does the station advertise open positions in widely read publications? Does the station have an internship program with local high schools, colleges, or universities? Does the station participate in a wide variety of job fairs? Does the station contact community based organizations, leaders and spokespersons to encourage referral of qualified applicants?

In addition to a series of questions requiring a "yes" or "no" response, the self-assessment analysis could include a place where broadcasters can, at their discretion, submit a narrative detailing their EEO efforts. This would allow broadcasters to elaborate on their efforts and to explain efforts that should be considered by the Commission but that do not comport with the analysis' "yes" or "no" questions. This type of analysis is consistent with the Commission's current efforts to streamline broadcast reporting requirements and to convert to electronic filing.

However, as discussed earlier in these comments, it should be emphasized that all aspects of a self-assessment reporting requirement must be *race and gender neutral*. If any aspect of a self-

assessment requirement encourages race-based or gender-based decision-making, it would be constitutionally suspect. Indeed, the Associations oppose any requirement that stations continue to file annual statistical profile reports on this ground. Although a statistical profile reporting requirement, on its face, seems neutral with respect to race and gender, the effect of such a requirement would be to encourage broadcasters to make race-based and gender-based hiring decisions. If a station manager knows that he or she will have to file annual statistical profile reports, surely that requirement would encourage him or her to make some hiring decisions on the basis of race or gender so that the station's numbers are "politically correct." It is highly probable that broadcasters would still have such an incentive even if they were clearly told that numbers were not considered to any degree in evaluating EEO compliance. They would still feel constrained to look "politically correct."

With respect to any recordkeeping requirement, like with all other EEO administrative requirements, any recordkeeping requirement must be reasonable and should allow broadcasters flexibility. At most, broadcasters should only be required to retain records to prove that they have made good faith efforts to recruit all qualified applicants in a non-discriminatory manner. The Commission should not require any specific documents or forms to be retained. Again, any specific requirement would pigeonhole broadcasters and limit them in creating individualized EEO programs. Rather, broadcasters should have discretion in deciding what types of records to retain.

For instance, broadcasters could retain print advertisements, recruiting brochures, resumes, applicant lists, and interview notes; however, none of these records should be specifically required to be maintained. Were the Commission to require stations to retain specific documents, the effect would be to constrain broadcasters in developing their EEO programs. For example, consider a particular station that has an effective recruitment program that involves participating in job fairs but

has found that print advertisements were not effective in increasing the pool of qualified applicants. A requirement that stations maintain records of any print advertisements would likely encourage the stations to run print advertisements despite the fact that print advertisements may not be an effective way to recruit in that community.

Thus, to ensure that broadcasters' EEO efforts are focused on creating fair and nondiscriminatory work environments and are not wasted on burdensome and non-productive administrative matters, self-assessment reporting and recordkeeping requirements should be reasonable. Like with a specific recruiting requirement, self-assessments and recordkeeping requirements should be designed in a manner that does not burden broadcasters and thereby affords broadcasters great flexibility in creating effective EEO programs.

#### **IV. Any New EEO Rule Should Allow Exemptions from Recordkeeping Requirements for Certain Broadcasters**

##### **A. Stations With Twenty-Five or Fewer Full-Time Employees Should Be Exempt from Self-Assessment and Recordkeeping Requirements**

As discussed above, a considerable amount of time and effort was needed in order to generate and maintain the required information under the Commission's old EEO rule. In particular, enormous resources were expended by smaller broadcasters. The resources which small broadcasters had to expend in attending to such paperwork matters was wholly out of proportion to the public benefits that were derived from them. In light of these undue burdens on small broadcasters, the Associations advocate granting relief from any reporting and recordkeeping requirements adopted by the Commission to all broadcast stations with twenty-five (25) or fewer full-time employees.

In the present era of multiple ownership, any drain on the resources of smaller broadcasters is particularly acute. In light of the elimination of national ownership limits and the relaxation of

local ownership limits brought on by the Telecommunications Act of 1996, multiple station ownership in individual markets is now the industry norm and stations which have twenty-five or fewer full time employees (including employees of commonly-owned stations in the same market) are now considered "small" stations. Thus, smaller broadcasters are now forced to compete with the greater financial and manpower resources of "super duopoly" broadcast stations. Any drain on resources caused by the EEO requirements will further impede the ability of smaller broadcasters to fairly compete with the larger station operations and, in the end, to serve the public.

Also, any self-assessment reporting and recordkeeping requirements adopted by the Commission should be reserved for only the largest broadcast employers because such requirements can crucially delay hiring decisions in small stations. In small stations, turnover is high and the need to fill vacancies quickly is great because employees are spread out over many duties, such as on-air, marketing, sales, promotions, clerical, management, engineering, etc. No single department will employ many people, and one less person for any length of time in any job category will have an adverse effect on the station. Under the Commission's old EEO rule, this adversity was compounded by the length of time spent recruiting the proper applicant pool and assigning much-needed staff to EEO administrative responsibilities. A twenty-five employee or fewer exemption standard would free small broadcasters from these burdensome administrative and recordkeeping requirements and permit small stations to fill vacancies quickly.

Thus, the Commission's new EEO rule should contain a safe harbor for stations with twenty-five or fewer employees. Such exemption for self-assessment and recordkeeping requirements would eliminate unnecessary burdens on small broadcasters and permit them to more effectively compete with larger broadcasters.

**B. Stations Which Establish Internship and Training Programs, Participate in State or Nationally Approved Job Fairs, or Participate in Approved EEO Programs Should Be Exempt from Self-Assessment and Recordkeeping Requirements**

The Associations also recommend that all broadcasters, regardless of size, should be granted an exemption from any EEO self-assessment reporting and recordkeeping requirements adopted by the Commission if they establish internship and training programs, participate in qualified job fairs, or participate in approved EEO programs. Such programs, unlike paperwork rules, may actually help real people who are interested in broadcasting as a career. Accordingly, the Associations propose that the Commission allow exemptions from self-assessment and recordkeeping requirements for stations that implement programs that are geared towards nondiscriminatory outreach.

It is the experience of many of the Associations' members that a substantial impediment to hiring for broadcast positions is lack of training. Accordingly, one proper focus of EEO efforts should be on training and career development of potential applicants. If broadcasters are willing to develop and implement such programs, they should benefit from such efforts by an exemption from recordkeeping and reporting requirements.

Qualified internship or training programs should consist of the following elements:

- (1) A systematic program geared towards the professional development of participants in the broadcast industry which teaches participants basic skills necessary for broadcast positions and emphasizes hands-on experience and training, under the supervision of trained employees; and
- (2) The program must last for at least one school semester.

Recognition of such programs will lead to the implementation of new and innovative programs and will result in tangible, real world benefits for participants.

C. Scope of the Proposed Exemptions

Stations which benefit from the exemptions described above should only be required to file with the Commission a statement certifying that they qualify for an exemption. The qualifying stations would otherwise be exempt from any EEO reporting and recordkeeping requirements, just like stations, under the Commission's old EEO rule, with less than five employees.

The extension of relief to this class of stations will not have a detrimental effect on equal employment in the broadcast industry. All broadcast stations will still be required to comply with Title VII of the Civil Rights Act of 1964. In addition, they would still be required to comply with the substantive aspects of any new EEO rule adopted by the Commission--broadcasters simply would not have to incur the administrative burden of self-assessment reporting and recordkeeping.

In the event of a challenge on EEO grounds of a qualifying station's license renewal application, the licensee will still have the opportunity to defend itself by providing a narrative description of its recruitment efforts and supplying whatever supporting data and information the station elects to maintain. Under this approach, the Commission would be prohibited from taking adverse action against an exempt licensee because of a lack of EEO records. The Commission could, however, require the licensee to keep such records on a case by case basis if the licensee's showing in response to an EEO challenge was not adequate.

**Conclusion**


For the reasons set forth herein, VAB and NCAB oppose the Commission's attempt to reinstate the administrative and recordkeeping requirements of the old EEO rule. In addition, VAB and NCAB believe that any EEO requirements adopted by the Commission must be race and gender neutral in order to satisfy constitutional concerns. VAB and NCAB respectfully encourage the

Commission to modify its proposed EEO rule, if a rule is adopted, as set forth specifically herein.

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